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No. 88-1170

In the Supreme Court of the United States

OCTOBER TERM, 1988

BOISE-KUNA IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The McCarran Amendment provides consent to the joinder of the United States as a defendant "in any suit * * * for the adjudication of rights to the use of water of a river system or other source" (43 U.S.C. 666). The question presented is whether joinder of the United States under the McCarran Amendment in an adjudication of rights to the use of water of Idaho's Snake River system requires the inclusion, within the geographic scope of that adjudication, of two tributary sub-basins.

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OPINIONS BELOW

The opinion of the Idaho Supreme Court (Pet. App. 1a-26a) is reported at 764 P.2d 78. The opinion of the Idaho district court (Pet. App. 27a-57a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on October 13, 1988. The petition for a writ of certiorari was filed on January 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). See note 2, *infra*.

STATEMENT

1. In 1986, the Idaho state legislature enacted legislation requiring "a comprehensive determination of the

nature, extent and priority of the rights of all users of surface and ground water from [the Snake River] system." Idaho Code § 42-1406A(1) (Supp. 1988). To accomplish this comprehensive determination, the legislature required that "the director of the department of water resources shall petition the district court to commence an adjudication within the terms of the McCarran amendment, 43 U.S.C. section 666, of the water rights of the Snake River Basin * * *" (Idaho Code § 42-1406A(1) (Supp. 1988)). The McCarran Amendment provides congressional consent "to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source * * *" (43 U.S.C. 666).

The Idaho statute prescribes the contents of the director's petition, including, in subparagraph (3), both mandatory and discretionary directives concerning the geographic scope of the proposed adjudication to be sought in the petition. Subparagraph 3(b) permits the director to include "adjudication of the water rights of the main stem of the Snake River which forms the boundary between the state of Idaho and the states of Oregon and Washington." Idaho Code § 42-1406A(3)(b) (Supp. 1988). The director is further granted discretion in this subparagraph to include any unadjudicated tributaries to this part of the mainstem in the petition, but he "shall not include in the petition * * * any adjudicated tributary unless the United States, or other parties whose consent is necessary, refuse to consent to the jurisdiction of the district court to adjudicate all federal or Indian water rights claims pursuant to the McCarran amendment, 43 U.S.C. section 666." Idaho Code § 42-1406A(3)(b) (Supp. 1988). The Boise and Weiser Rivers are both tributaries of the Snake River, and both join the Snake River along the portion of the mainstem that forms the boundary between Idaho and Oregon.

2. The Idaho director of water resources filed a petition on June 17, 1987 (Pet. App. 28a-29a), pursuant to Idaho Code § 42-1406A, requesting that the district court "commence an adjudication, within the terms of the McCarran amendment, of the water rights of the Snake River basin" (Pet. App. 27a-28a). The petition, in proposing specific geographic boundaries for the adjudication (*id.* at 29a), excluded the Boise River and Weiser River tributary sub-basins and two other sub-basins not at issue here (*id.* at 49a).

The United States and a number or other parties objected to the exclusion of the Boise and Weiser sub-basins (Pet. App. 50a). The United States urged that the Boise and Weiser tributaries, which contributed to the total flow of the Snake River, had to be adjudicated to determine the downstream water rights at issue in the proposed general stream adjudication. The United States further urged that exclusion of the Boise and Weiser sub-basins would defeat McCarran Amendment jurisdiction over the United States because the state court proceeding would not be a comprehensive, general adjudication of all water rights within the river system (*ibid.*).[1]

The district court ruled, among other matters, that the Boise and Weiser River sub-basins must be included in

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[1] The State of Idaho itself recognized that the tributary water rights had not been fully or finally adjudicated. The state director's petition indicated that past adjudications involving the Boise and Weiser Rivers had concerned only rights to the use of surface water and not to the use of groundwater, and that the United States was at most a party to only one of the two major decrees concerning rights to surface water on the Boise River, and was not a party to any decree concerning rights to surface water on the Weiser River (Petition for the General Adjudication of Rights to the Use of Water from Snake River Basin Water System, No. 39576 (5th Dist. Ct. June 17, 1987), paras. 15, 16).

the general stream adjudication. Pet. App. 27a-57a. The court concluded that under Idaho Code § 42-1406A's "consent" provision the United States' objection to the exclusion of those sub-basins was sufficient, by itself, to require their inclusion in the general stream adjudication (Pet. App. 49a-50a). In addition, the court agreed with the United States that "the McCarran amendment, cases interpreting it and the legislative history to it require that an adjudication be a general adjudication of all rights *inter se* of a river system or other source in order to obtain jurisdiction over the United States" (*id.* at 52a). The court recognized that "[a] comprehensive adjudication of all water rights in the Snake River basin cannot occur without including the sub-basins" (*ibid.*) and that "the inclusion of these sub-basins is necessary in order to obtain lawful jurisdiction over the United States" (*id.* at 53a).

3. The Idaho Supreme Court affirmed the district court's order. Pet. App. 4a-26a. The state supreme court disagreed with the district court's conclusion that under Idaho Code § 42-1406A the United States' objection in this litigation was sufficient, by itself, to require inclusion of the two sub-basins. The court construed Idaho Code 42-1406A's consent provision as referring "to the existing consent by Congress in the McCarran Amendment" (Pet. App. 13a), and "not to some special consent of the United States" (*id.* at 14a).

The court nevertheless concluded that the McCarran Amendment's consent to joinder in "the adjudication of rights to the use of water of a river system" (43 U.S.C. 666) required that the adjudication of the Snake River system include determination of water rights in the hydrologically related Boise and Weiser sub-basins. Pet. App. 14a-21a. The court recounted the consistent reading given the McCarran Amendment by this Court and the lower federal courts (*id.* at 14a-18a). The court specifi-

cally rejected (*id.* at 18a-20a) petitioners' contention that this Court's decisions in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520 (1971), and *United States* v. *District Court in and for Water Division No. 5*, 401 U.S. 527 (1971), required a different result.

ARGUMENT

The Idaho Supreme Court correctly held that the McCarran Amendment does not permit the State of Idaho to join the United States in a general stream adjudication of the Snake River system unless the adjudication includes two hydrologically related sub-basins. The State of Idaho, which initiated the stream adjudication and is a respondent to the petition for a writ of certiorari, agrees with that holding. The Idaho Supreme Court's decision does not conflict with any decision of this Court or any other court. Accordingly, further review is not warranted.[2]

1. The McCarran Amendment's plain language controls this case. That statute permits joinder of the United States in suits "for the adjudication of rights to the use of water in a *river system*" (43 U.S.C. 666 (emphasis added)). The term "river system"—by definition—includes the river's main stem *and* its contributing branches. See, *e.g.*, *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520, 523 (1971) ("the Eagle [River] and its tributaries" are "a 'river system' within the meaning of

[2] We do not contest that the judgment of the Idaho Supreme Court is final for purposes of 28 U.S.C. 1257(3). The federal issue here "has been finally decided in the state courts with further proceedings pending in which the part[ies] seeking review here might prevail on the merits on nonfederal grounds" and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" with respect to those parties. See, *e.g.*, *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-485 (1975).

the Act"). Thus, the McCarran Amendment here quite plainly limits joinder of the United States to an adjudication of rights to the use of water of the Snake River and its tributaries.

Congress's objective in including tributaries is obvious. Since a general stream adjudication involves the apportionment of competing claims to a limited resource, it cannot proceed unless all of the potential claimants are before the court. And since the upstream tributaries contribute to the total resource available for downstream apportionment, the upstream claims must be adjudicated to determine downstream flows and priorities. Thus, the inclusion of tributaries is necessary to ensure "a *general* adjudication of '*all* of the rights of various owners on a given stream' " (*Dugan* v. *Rank*, 372 U.S. 609, 618-619 (1963), quoting S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951) (emphasis added)). As the Idaho Supreme Court explained (Pet. App. 14a-16a), the McCarran Amendment's legislative history fully supports this view.[3]

Petitioners principally argue that the Idaho Supreme Court's interpretation of the McCarran Amendment is contrary to the federal policy of deference to state water law. See Pet. 11-14. A general policy cannot, however, override plain statutory language. Moreover, the Idaho Supreme Court's interpretation is manifestly consistent with Idaho's practices in administering water within its borders. As the State of Idaho has explained:

> The practical effect of the Idaho Supreme Court's judgment is to include two subbasins within the

[3] Petitioners describe the Boise and Weiser tributaries as "adjudicated" tributaries (see *e.g.*, Pet. 9), suggesting that the water rights in those sub-basins have already been determined. But as both of the lower courts (as well as the State of Idaho, see note 1, *supra*) recognized, the Boise and Weiser tributaries have not been fully and finally adjudicated. See Pet. App. 8a-9a, 52a.

> Snake River Basin general adjudication and to incorporate these old decrees into a comprehensive decree adjudicating all rights to the use of water within the Snake River Basin. This will result in better administration of the entire Snake River Basin.

Idaho Br. in Opp. 12.

Petitioners also characterize the Idaho Supreme Court's interpretation of the McCarran Amendment as " 'frivolous' and 'extremely technical' " (Pet. 20). Quite to the contrary, the court has simply construed the statute according to its plain terms and objectives. The court's adherence to the McCarran Amendment's language is particularly appropriate here because the statute provides a limited waiver of the United States' sovereign immunity and places claims against the United States within the jurisdiction of state courts. It is well settled that "when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). Furthermore, jurisdictional provisions, which are to " 'be read by judges with the minds of . . . specialists' " (*Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 212 (1968)), "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes" (*ibid.*).

2. Petitioners appear to acknowledge (Pet. 10) that the Idaho Supreme Court's decision does not stand in square conflict with any decision of another court. They maintain, however, that the Idaho Supreme Court's decision "conflicts in principle" (*id.* at 10, 15) with this Court's decisions in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520 (1971), and *United States* v. *District Court in and for Water Division No. 5*, 401 U.S. 527 (1971). The Idaho Supreme Court correctly rejected that contention. See Pet. App. 18a-20a.

In *Eagle County*, this Court principally held that the McCarran Amendment permits state courts to adjudicate federal reserved water rights. 401 U.S. at 521-525. In the course of reaching that decision, the Court observed that "the Eagle [River] and its tributaries"—though a part of the Colorado River drainage basin—comprise "a 'river system' within the meaning of the Act" (*id.* at 523). That observation simply recognizes that a major river system may consist of a number of smaller river systems. Applied to the circumstances here, it would suggest that Idaho could have joined the United States in an action to adjudicate rights in a Snake River tributary, such as the Boise (or the Weiser) River, provided that the adjudication embraced all of *that* tributary's upstream constituent parts. But since Idaho wishes to join the United States in an action to adjudicate rights in the Snake River system, the adjudication correspondingly must include the Snake River's mainstem and all of *its* upstream constituent parts.

In *Water Division No. 5*, the Court approved the use of the McCarran Amendment to join the United States in an action brought under Colorado's unique water rights adjudication procedures, which consist of dividing the State's territory into a number of "water divisions" and determining claims in "monthly proceedings before a water referee" (401 U.S. at 528-529). The Court held that this approach amounted to a general stream adjudication because these ongoing judicial proceedings, held concurrently in the different divisions, would reach "all claims, perhaps month by month but inclusively in the totality" (401 U.S. at 529). Thus, *Water Division No. 5* simply stands for the proposition that a State has latitude to determine *how* to conduct a general stream adjudication; it does not alter the requirement that the adjudication em-

brace an entire "river system" (43 U.S.C. 666).[4]

Accordingly, the Idaho Supreme Court's decision in this case is entirely consistent with this Court's decisions in *Eagle County* and *Water Division No. 5*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioners contend that *Water Division No. 5* supports the exclusion of the Boise and Weiser Rivers from adjudication of the Snake River system because the Colorado legislature had placed the Colorado River and one of its tributaries, the Gunnison River, in separate water divisions. This Court noted, but did not comment on, that division. See 401 U.S. at 528. As the Idaho Supreme Court explained (Pet. App. 20a), the Colorado legislature's action does not conflict with the result in this case. The Colorado legislature's administrative scheme assures that the Gunnison River and its tributaries will be subject to a concurrent, ongoing adjudication of water rights, albeit in a geographically separate water division. Thus, Colorado's procedure fulfills the McCarran Amendment's basic goal of assuring a comprehensive determination of water rights. See generally *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 819-820 (1976).

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